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IN THE

Supreme Court of the United States

October Term, 1950.

No. 217.

**ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD,
JAMES E. DOGGETT AND RALPH BAKER,**

Petitioners,

vs.

**HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA
CUMMINGS AND MRS. MABLE PRICE,**

Respondents.

**MEMORANDUM IN RESPONSE TO PETITION
FOR A WRIT OF CERTIORARI.**

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While we believe that the decision of the Court of Appeals for the Ninth Circuit is clearly correct, we do not oppose the grant of the petition because it presents a question of construction of a Federal statute which has not been and should be settled by this Court in view of the conflict of the Circuits on this issue and its public importance.

Question Presented

The issue presented by the decisions of the Courts below and by the petition is whether the Federal civil rights legislation establishes a civil cause of action against private persons who, pursuant to a conspiracy, prevent by violence the continuance of an assembly of citizens called to discuss national affairs and to petition Federal officials for a redress of grievances.

The section of the civil rights legislation here involved reads:

§47. Conspiracy to Interfere With Civil Rights.

* * * * *

Depriving Persons of Rights or Privileges.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act

in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[8 U. S. C. 47(3), derived from Act of April 20, 1871, c. 22, sec. 2, 17 Stat. 13, hereinafter referred to as section 47(3).]

Statement of the Case.

Proceedings—On the basis of respondents' complaint praying for damages under section 47(3) and petitioners' motion to dismiss the complaint for failure to state a cause of action, the District Court granted petitioners' motion [R. 49-50].

The facts set forth in the complaint are stated in the Petition. In sum, the complaint alleged that the respondents, citizens of the United States, were officers of a local Club of the Democratic Party which had scheduled for one of its regular public meetings a discussion of the Marshall Plan and consideration of the adoption of a resolution in regard to it for forwarding to the President of the United States, the State Department and members of Congress [R. 2-5]. Because of their opposition to respondents' views, petitioners, pursuant to a conspiracy, broke up the meeting, and prevented the adoption and transmission of the proposed resolution by threatening and assaulting the respondents and other participants [R. 5-8]; petitioners did not, however, interfere with public discussions and the adoption of resolutions respecting the

— 4 —

foreign policies of the United States, by organizations expressing views with which they agreed [R. 6].

Decision of the District Court—The District Court held that the complaint failed to state a cause of action, on the basis that section 47(3) does not establish a cause of action for acts of interference with Federal privileges unless committed by virtue of power granted by the State [R. 34.] The Court took cognizance of the principle that Congress has power under the original Constitution absent the amendments to protect the privilege of assembling to petition the Federal Government and discuss national affairs, against interference by private persons [R. 20-22, 23-24]; his holding that the power was not exercised in section 47(3) was based largely on the civil rights decisions of this Court which have arisen under the Thirteenth, Fourteenth and Fifteenth Amendments and have held that Congress is empowered to protect the rights assured thereunder only against State action [R. 22, 24-26, 34-39]. The District Court also relied on the decision of the Eighth Circuit in *Love v. Chandler*¹ [R. 22-23, 34-35] and on some of the phraseology of section 47(3) [R. 24-26].

Decision of the Circuit Court of Appeals—The Court of Appeals, in a two to one decision, reversed the District Court, holding that section 47(3) applied to the acts of private persons. The Circuit Court pointed to the fact that any other construction would deprive the various provisions of the section of reasonable meaning [R. 65-66], and to this Court's similar construction of a statute with identical language [R. 66].² The legislative history of

¹124 F. 2d 785 (1942).

²In *United States v. Harris*, 106 U. S. 629.

47(3), on which the Circuit Court relied as additional evidence of the Congressional intent, showed that though the statute was enacted with the intent of enforcing the Fourteenth Amendment, Congress believed the Amendment gave it power to act against private persons [R. 66-68]. The reference in 47(3) to the denial of "equal" privileges and immunities, on which the District Court had relied, was intended in a sense entirely consistent with the purpose of establishing a cause of action against private persons [R. 68].

As to the constitutional power of Congress to enact 47(3) in its intended scope, the Court pointed out that while the Constitution guarantees for the most part apply only to State action, this Court has repeatedly upheld the power of Congress to protect a narrow set of rights against infringement by private individuals [R. 69-70]. And the Circuit Court held, on the basis of this Court's repeated assertions in dictum dating from 1876, "that the rights to assemble for the purpose of discussing the policies of the Federal Government and petitioning that Government for redress of grievances" [R. 71], which are "the rights alleged to have been violated in the instant case," "are within that narrow area of rights which Congress has constitutional power to protect from individual invasions" [R. 72].

Finally, the Court concluded that the Congressional power to accord protection against acts of private persons had been validly expressed in section 47(3), distinguishing this Court's decisions in *United States v. Harris*,³ and *Baldwin v. Franks*.⁴ In the latter decision, this Court

³*Ibid.*

⁴120 U. S. 678.

reiterated the *Harris* holding that a prior statute with a coverage somewhat similar to 47(3) was unconstitutional in that it applied to the deprivation of rights under State laws as well as of Federal rights, and further ruled that the State and Federal phases of that statute were inseparable. The Circuit Court held that the coverage by 47(3) of deprivations of Federal rights was separable on the basis of the provision, which had not appeared in the prior statute, respecting acts in furtherance of the conspiracy [R. 74-75]. The Court doubted the merit of the contention that its construction of 47(3) would result in a flooding of the Federal Courts, and stated that in any event this possibility could not influence its decision [R. 72, 75].

Dissenting Opinion—Judge Healy, dissenting, voiced his "general agreement" with the District Court's opinion [R. 75]. Further, while agreeing that Congress had intended to legislate in section 47(3) against the acts of private persons, he was of the opinion "that Congress succeeded only in providing redress for conduct of which individuals are in the nature of things incapable except when acting under color of state authority" [R. 86]. Relying on this Court's opinions, the dissenting judge maintained that while private individuals might interfere with the exercise of equal rights and privileges, such interference could not be deemed a denial or deprivation of the right unless the individual's interference was in some way sanctioned by the State [R. 78-81]. He deplored the majority's construction of 47(3) as opening "wide the gates to federal intervention in a field heretofore thought solely within the competence of the states" [R. 87], and as placing "the federal government under the necessity of policing political meetings throughout the whole of the forty-eight states" [R. 86].

Reasons for Granting Writ.

While we believe the Circuit Court's decision is clearly correct, we submit that this Court, which has not heretofore been presented with the instant issue of statutory construction, should determine it. In the first place, there is a clear conflict between the decision in the instant case and a decision of the Court of Appeals for the Eighth Circuit, which requires settlement by this Court. Further, the implementation of 47(3) by the Circuit Court's construction is of outstanding significance in the operation of the Federal civil rights legislation, and in the maintenance of basic Constitutional rights; thus, we believe that even aside from the conflict in the decisions, this construction should be asseverated and established by the judgment of this Court as the law of the land. And that the issue is one deserving, from the standpoint of its difficulty, of this Court's consideration is indicated not only by the conflicting decisions, but also by the dissent in the instant case, and the fact that the trial court's decision to the contrary of the Circuit Courts was supported by a careful and scholarly opinion; in addition, it is to be noted that the Circuit Court found it necessary in order to arrive at its conclusion to distinguish two of this Court's decisions. Finally, as pointed out by petitioners, the instant decision is of peculiar significance since it appears to be the first since the passage of the statute in 1871 in which a complaint based solely upon section 47(3) has been held valid.

1. *Conflict Between Circuits*—As pointed out in the Petition, the instant decision of the Ninth Circuit is in clear and direct conflict with the decision of the Eighth Circuit in *Love v. Chandler*.⁵ In that case it was ruled

⁵Cited *supra*, note 1; followed in the Eighth Circuit in *Moffett v. Commerce Trust Co.*, 75 Fed. Supp. 303, 306 (W. D. Mo., 1947).

that a complaint for damages on the basis of acts performed by persons in their private capacities, pursuant to a conspiracy, to deprive the plaintiff of his rights under the Federal WPA law, failed to state a cause of action under section 47(3) and the preceding subsection of section 47. The Court squarely based its holding on a construction of section 47, contrary to the instant one; it held that the section did not apply to acts by "persons, as individuals," (124 F. 2d at p. 787) and, was only "intended to provide for redress against State action" (124 F. 2d at p. 786). The Circuit Court in the instant opinion pointed out that it regarded its decision as in conflict with *Love v. Chandler* [R. 69] on which the District Court had heavily relied [R. 22-23, 34-35].

While there do not appear to be any other definitive holdings on the question here at issue, the Court of Appeals for the District of Columbia has indicated agreement with the instant holding.⁶ On the other hand, several courts have stated that section 47 does not apply to the acts of private persons,⁷ and the *Chandler* opinion has been cited with approval in several opinions.⁸

2. *Public Importance of Question at Issue and of its Determination by this Court*—This Court's affirmance of the ruling that 47(3) establishes a civil cause of action against private persons, is the last step necessary to complete the validation of the various forms of remedy pro-

⁶*Laughlin v. Rosenman*, 163 F. 2d 838, 843. (1947).

⁷See *Viles v. Symes*, 129 F. 2d 828, 831 (C. A. 10, 1942); *Boltone v. Lindsley*, 170 F. 2d 705, 706 (C. A. 10, 1948); *Bomar v. Bogart*, 159 F. 2d 338, 339 (C. A. 2, 1947); *Allen v. Corsano*, 56 Fed. Supp. 169, 171-173 (D. Del., 1944).

⁸See *Boltone*, *Bomar*, and *Allen* cases, loc. cit. *supra*, note 7.

vided by the Federal civil rights legislation; for the other three procedures for the maintenance of Federal rights,—the criminal⁹ and civil¹⁰ actions against persons clothed with State authority, and the criminal action against private persons,¹¹—have already been upheld by this Court. And, as this Court has pointed out,¹² it is of special importance to implement the sections of the civil rights acts now extant, because Congress has preserved them for more than half a century, despite its repeal of numerous other sections of the original civil rights legislation; similarly, the precedents of this Court which support the Circuit Court's construction of 47(3), particularly warrant effectuation because of their time-honored and unchallengeable status.

The fact that the rights implemented by the proper construction of 47(3), as rendered by the Circuit Court, are among the most significant in our political system, further augments the importance of its affirmation by this Court as the law of the land. The very test of whether a right is a Federal privilege or immunity protected by section 47(3) is whether it is in the small class of those which are "essential to the healthy organization of the Government itself."¹³ And the significance of the particular right here involved,—to assemble to discuss national issues and petition the Federal government,—lies in the truth, epitomized by the Circuit Court on the basis of numerous opinions of this Court, that "a representative government

⁹*Screws v. United States*, 325 U. S. 91.

¹⁰*e. g. Hague v. C. I. O.*, 307 U. S. 496.

¹¹*e. g. Ex parte Yarbrough*, 110 U. S. 651.

¹²*Screws v. U. S.* 325 U. S. at p. 100.

¹³*Ex parte Yarbrough*, 110 U. S. at p. 666.

cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent" [R. 72-73].

As recognized by Congress in providing for the criminal action against private individuals already upheld by this Court and the civil action against them here in issue, a remedy against mob action by private individuals is as important as a remedy against acts under color of State law in preserving the right of the people, particularly of unpopular minorities, to speak on Federal affairs as well as their other Federal rights.¹⁴ Further, the civil cause of action may have more significance than the criminal in the maintenance of these rights. For, besides the prosecutor's necessary selectivity, official reluctance to prosecute may well coincide with mob hostility to Federal rights; and a jury may be willing to render a civil verdict for the infringement of political rights, while viewing such rights with insufficient concern to impose a criminal penalty.¹⁵

¹⁴Thus, District Judge Yankwich, though dismissing the complaint, stated:

"We grant that the acts complained of * * * inflicted a grievous wrong on the plaintiffs. Such acts are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society * * *. They would enthrone the mob as arbiter of freedom. And I know of no more unsafe and unforthly repository of the rights of the individual" [R. 40].

And see the statement by Mr. Justice Clark, penned while Attorney General:

"Our democracy suffers a grievous, if not fatal, blow when the processes of law and order are broken down by mob violence."

Clark, *A Federal Prosecutor looks at the Civil Rights Statute*, 47 Col. Law Rev. 175, 185 (1947).

¹⁵See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; "To Secure These Rights," Report of President's Committee on Civil Rights (1947), pp. 117-118.

Thus, the certainty by virtue of 47(3) that redress can be sought for a violation of Federal rights, regardless of whether, because of its political significance or for other reasons prosecution is instituted, will serve as an important deterrent to violations, and as a safeguard of the universal security of the rights essential to a representative government.

The chance that the State police will prevent infringement, as suggested by Judge Healy [R. 88], or that the conduct infringing Federal rights will give rise to a State cause of action,—which is a possibility in the case of all the other sections of the civil rights legislation as well as 47(3),—does not nullify the importance of 47(3). It is only an action specifically directed at the protection of the Federal right, with the gravity of the conduct and of the resultant damages measured in terms of its invasion, which will vindicate and assert the plaintiff's Federal rights and, in view of the national scope of the cause of action, serve as a nationwide deterrent to their violation.

For all these reasons, we believe that the question on which the Court of Appeals for the Ninth Circuit differs in the instant decision from the Eighth Circuit is one of serious significance, and that it is of substantial public importance¹⁶ that the correct construction of section 47(3),

¹⁶In the court below, the National Association for the Advancement of Colored People, the American Jewish Congress and the Congress of Industrial Organizations filed briefs *amicus curiae* urging the construction which the court adopted. In view of Rule 27(b) of this court no briefs *amicus* have been filed at this time, but it is expected that if certiorari is granted, appropriate steps will be taken by these and perhaps other organizations looking to the filing of such briefs.

as set forth in the Circuit Court's decision, be established as the law of the land. We therefore submit that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Service of the within and receipt of a copy
thereof is hereby admitted this.....day of
September, A. D. 1950.
